SEIZURE OF THE SOUTHERN COMMISSIONERS

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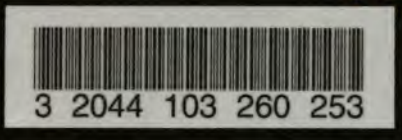

1862.

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THE SEIZURE

OF THE

SOUTHERN COMMISSIONERS,

CONSIDERED WITH REFERENCE TO

INTERNATIONAL LAW,

AND

TO THE QUESTION OF

WAR OR PEACE.

BY

PHILIP ANSTIE SMITH, M.A., LL.B.,

BARRISTER-AT-LAW.

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A large part of this pamphlet had been printed before the writer was aware of the publication of others on the same occasion, by authors who have evidently studied the subject with care, and discussed it with ability. But, while some leading cases and topics have been mentioned in every instance, independent inquiries cannot but vary in some parts of their paths, and the merits of the question are not likely to receive too careful or full consideration. This contribution to the discussion is therefore left to take its place among others, if it shall be thought to deserve it.

THE SEIZURE

OF THE

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CONSIDERED WITH REFERENCE TO

International Law, &c.

THE subject of these pages requires very few prefatory words, since it has for some weeks occupied the attention of the country, and been so frequently mentioned that its supposed facts have become generally known; while the very great importance of its possible consequences has contributed to awaken public interest and stamp the particulars more strongly on the mind. In such circumstances, the following very concise statement of the occurrence in question will serve to introduce a discussion of some points of international law which it involves.

Two Commissioners from the American Southern Confederacy were passengers on board a British Mail Steamship. This was stopped by an armed vessel in the service of the Federal Government, and the Commissioners were taken from on board as prisoners by the compulsion of superior force.

Several questions arise out of this transaction, which may be classified, as they relate, on the one hand, to the supposed liability of the Commissioners to detention in some regular mode, or, on the other, to the mode in which their detention has been actually effected. The latter of these topics shall be noticed first:—

Is, then, the forcible seizure of the Commissioners *from on board* a neutral vessel defensible by international law?

The writer is not aware of any decision relating expressly to the removal of goods or persons, liable to seizure, from the neutral ship on which they are found. The difficulty of finding an instance in point indicates, at any rate, the infrequency of such occurrences.

In the absence of any known judicial statement of the law relating to such an act, it may be remarked—

First—That the general rule of maritime capture requires captured vessels to be taken into port, in order to a trial of the case before some competent tribunal.—"Regularly a captor is bound by the law of his own country, conforming to the general law of nations, to bring in for adjudication, in order

that it may be ascertained whether it be enemy's property, and that mistakes may not be committed by captors in the eager pursuit of gain, by which injustice may be done to neutral subjects, and national quarrels produced with the foreign states to which they belong."* If the captor "neglects to apply to any tribunal, he would be guilty of a great misdemeanour," says Sir William Scott in another case.† And elsewhere the rule is thus given, with some account of the occasion for it:—"In later times, an additional formality has been required—that of a sentence of condemnation, in a competent court, decreeing the capture to have been rightly made, *jure belli;* it not being thought fit, in civilised society, that property of this sort should be converted without the sentence of a competent court, pronouncing it to have been seized as the property of an enemy, and to be now become *jure belli* the property of the captor. The purposes of justice require, that such exercises of war should be placed under public inspection; and therefore the mere *deductio infra præsidia* has not been deemed sufficient."‡ The authority

* Judgment of Sir W. Scott. The Felicity, 2 Dodson, 385.

† The Huldah, 3 Robinson, 238.

‡ Sir W. Scott, The Henrick and Maria. 4 Robinson, 55.

of Chancellor Kent may also be cited :— "When a prize is taken at sea, it must be brought, with due care, into some convenient port, for adjudication by a competent court, though, strictly speaking, as between the belligerent parties, the title passes, and is vested when the capture is complete ; and that was formerly held to be complete and perfect when the battle was over, and the *spes recuperandi* was gone."*

The rule above mentioned has, indeed, exceptions ; for "if a king's ship, bound on the public service, makes a capture in her course, such a vessel cannot depart from her instructions, but must proceed upon her original destination. That would be a case of necessity, arising out of the public service, for which states must make allowance reciprocally."† And if a man-of-war belonging to a belligerent government be by very urgent occasions of the public service prevented from bringing a captured vessel to any port whatever for adjudication, then, if the vessel taken be hostile, it is said that she may lawfully be destroyed. But in connexion with this statement the peculiar rights of

* Kent's Commentaries, Vol. 1, 101.

† Sir W. Scott, The Anna. 5 Robinson, 385.

neutral, as distinguished from hostile, ships are strongly expressed. "If impossible to bring in, their next duty is to destroy enemy's property. Where doubtful whether enemy's property, and impossible to bring in, no such obligation arises, and the safe and proper course is to dismiss. Where it is neutral, the act of destruction cannot be justified to the neutral owner, by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified, under any such circumstances, by a full restitution in value. These are rules so clear in principle and established in practice, that they require neither reasoning nor precedent to illustrate or support them."* The general duty, in cases of maritime capture, to bring in for adjudication, has been discussed in some of the previous remarks in connection originally with cases where the vessels captured have been hostile, and those remarks are, therefore, not addressed to the specific case of captures consequent on the right of search of neutral vessels. But—

Secondly—In the mention made by some writers on international law of the right of

* Sir W. Scott, The Felicity. 2 Dodson, 386.

search itself, the duty of bringing in for adjudication is noticed. The authority of Chancellor Kent and of Mr. Wheaton shall be cited here. The former says that— "If, upon making the search, the vessel be found employed in contraband trade, or in carrying enemy's property, or troops, or despatches, she is liable to be taken and brought in for adjudication before a prize court."* The latter has the following words:— "If the seizure were made in time of war, the adjudication must necessarily take place, according to the well known law and usage of nations, in the prize court of the country of the captor, who is responsible to his own government, whose commission he bears, for his acts under that commission; and that government again is responsible over to the neutral state, whose subjects may complain of the injury by them sustained."† At another place there is the following passage: "If a vessel sailing under the neutral flag is boarded and examined by a belligerent armed and commissioned cruiser, and the result of the examination establishes her

* Kent's Com., Vol. 1, 153.

† Wheaton's Enquiry into the validity of the British claim to a right of visitation and search of American vessels suspected to be engaged in the African Slave Trade, p. 138 (Ed. 1858).

neutrality in the judgment of the boarding officer, or his superior commander, she is of course released, and suffered to pursue her voyage. But if, on the other hand, their *prima facie* judgment be, that the ship or cargo is in reality enemy's property, or that the latter is contraband of war, or that the proprietor or master have been guilty of some unneutral act, by which the property is rendered liable to confiscation, the vessel is, of course, detained, and sent in for trial in the competent prize court of the captor's country."* A little after, he says, "We repeat, if the seizure had been made in time of war, the captured vessel must be carried into port for adjudication before the competent prize court of the captor's country."†

It may be objected that, in the whole of the arguments founded on the authorities before cited, it has been tacitly assumed that no judicial investigation before a proper tribunal will really take place. That the fact of the removal of the Commissioners

* *Ib.*, pp. 155-6.

† Wheaton's Enquiry, p. 156. It is fair to mention, in reference to these passages, that they occur in a very able *ex parte* argument; and that the author would be naturally disposed, with reference to it, to enforce the view contained in those passages. Still they come stamped with the authority belonging to Mr. Wheaton's knowledge of the subject.

from the *Trent* is no proof that regular proceedings, with a view to adjudication, will not be instituted, and that, perhaps, they may have been already instituted.

In reply, it may be said, first and chiefly, that at present there is not proof or indication that this has been, or will be, done. And it may be said further, that a proper degree of promptitude is required in taking such steps.* It may be added that the course pursued in this instance is objectionable, as removing the evidence of the other persons on board the *Trent*. An inquiry, in order to be of use, should be one in which all necessary witnesses might be forthcoming. If it be answered that there is no substantial doubt as to the official character of the Commissioners, even this (if the fact were assumed to be so), though it might affect materially the importance of evidence, would not make a judicial inquiry unnecessary; for, as will be seen, the international law on the subject turns in great part on the inferences to be drawn from that official character, and is of a kind not to be determined by naval officers.

The very nature of the right of search requires particular correctness in its exercise.

* The "Zee Star," 4 Rob., 71. The "Madonna del Burso, *ib.* 171."

The right itself is well established, and resistance to it would be unlawful;* but it is "a right of force, though of lawful force," and therefore one in which the rules directing it should not be open to arbitrary extension or variation. It may be supposed (and it may be the fact) that the owners of the neutral vessel have really suffered less inconvenience and loss than if the vessel, as well as the Commissioners, had been taken into port for regular examination of the seizure; but this would not establish the correctness of the course which was pursued, or justify it if incorrect.

Thus, then, it appears that the general rule with respect to maritime captures, requires that ships, when taken, should be brought to some port, and that the lawfulness of the seizure should be established before a competent tribunal; and this rule is expressly mentioned as applicable to captures consequent on search of neutral vessels. If there is no express prohibition of the removal from a neutral ship of persons claimed as liable to seizure, neither is there, to the writer's knowledge, any instance where the act has been judicially sanctioned, or

* See especially the case of "The Maria," 1 Rob., 340.

even where it has been made the subject of a trial. And the right of search, being a right of some hardship (though of necessary hardship) towards neutrals, is one which should not be arbitrarily modified in its exercise. In the present instance, it does not appear that any legal proceedings have been instituted; and such a seizure, if allowed to stand on the mere strength of the original capture, would tend to constitute naval officers judges of international rights, and to expose unarmed vessels to risks and injuries, the serious importance of which scarcely needs comment.

The questions considered hitherto relate to the *manner* in which the arrest and detention of the commissioners have been effected. But, if all exceptions to irregularity of procedure be laid aside, what are the doctrines of international law as to the further question of *liability to seizure?*

Were the Commissioners, in a neutral ship, liable to arrest and detention at all?

According to the English decisions, persons connected in some way with the *military or naval* service of the enemy appear to be the *only persons* so liable. And incidental references in an account given by Mr.

Wheaton of the judgment in an American case (with which no other case, so far as the writer knows, is in conflict) confirm this view. "It was," he says, "stated in the judgment of the court, that it had been solemnly adjudged in the British prize courts, that being engaged in the transport service of the enemy, or in the conveyance of military persons in his employment, or the carrying of despatches, are acts of hostility, which subject the property to confiscation. * * * * * * * * The principle of these determinations was asserted to be, that the party must be deemed to place himself in the service of the enemy state, and to assist in the warding off the pressure of the war, or in favouring its offensive projects."*

In one important case before Sir William Scott, he states that the principle "that the carrying military persons to the colony of an enemy, who are there to take on them the exercise of their military functions, will lead to condemnation,"† was that on which he determined the case. The same judgment contains, in an earlier part, a passage which,

* Reference to the case of "The Commercen," in Wheaton's Elements of International Law, Vol. II., p. 221. (Ed. 1836.)

† "The Orozembo," 6 Rob., 436.

at first sight, may seem to have a contrary tendency, as throwing out an opinion that even the act of carrying persons in the *civil* service of the government might, in the circumstances of that instance, have occasioned the forfeiture of the vessel; yet, on examination, it will be seen that the relation of the transport of such persons to the *conduct of the war* is intimated, for the vessel is spoken of as let out for a purpose "intimately connected with the hostile operations." And the learned judge *afterwards* states the decision of the case before him to rest on the principle mentioned in the extract already given. The passage relating to the civil servants of the enemy runs thus:—"In this instance the military persons are three, and there are, besides, two other persons who were going to be employed in civil capacities in the government of Batavia. Whether the principle would apply to them alone, I do not feel it necessary to determine. I am not aware of any case in which that question has been agitated; but it appears to me, *on principle*, to be but reasonable that, whenever it is of sufficient importance to the enemy, that such persons should be sent out on the public service, at the public expense,

it should afford equal ground of forfeiture against the vessel, that may be let out for a purpose so intimately connected with the hostile operations."* It will be seen that these civil servants were to be engaged in the government of a colony of the enemy, and this formed one element in the case. Lord Stowell's remarks, on another occasion, throw light on the theory which he expresses here, that persons so occupied may be considered as connected with the war itself. "It is the right of the belligerent to intercept and cut off *all* communication between the enemy and his settlements, and, to the utmost of his power, to harrass and disturb this connexion, which it is one of the declared objects of the ambition of the enemy to preserve."† "The former cases were cases of neutral ships, carrying the enemy's dispatches, from his colonies to the mother country. In all such cases you have a right to conclude, that the effect of those despatches is hostile to yourself, because they must relate to the security of the enemy's possessions, and to the maintenance of a communication between them; you have a

* Sir W. Scott. "The Orozembo." 6 Rob., 434.
† Sir W. Scott. The "Caroline." 6 Rob., 465.

right to destroy these possessions and that communication ; and it is a legal act of hostility so to do."*

Thus, then, it does not appear that any of the enemy's subjects, except those belonging or attached in some manner to the military or naval service, have been judicially held liable to seizure. And in the instance above mentioned, in which Sir William Scott expressed an opinion that particular individuals, although not so belonging or attached, might have been considered liable, they were persons who were going out to be employed in the civil government of an enemy's colony. Those among the enemy's subjects who do not belong to either class, and cannot fairly be brought within the compass of Sir William Scott's reasoning in relation to either, are exempt as well from the force of his opinion above stated as from the greater authority of the adjudged cases.

Thus far the argument has been negative —that no liability, according to international law, was shown to exist. And at that point the matter might be left; for if a person who is taking a passage in a neutral ship does not sustain any character which renders him liable to detention, it is not

* *Ib.*, 466.

necessary to go further and show that a character which he does sustain carries with it any special reason for his immunity.

But something may be urged on this ground also; for, on the assumption that the Commissioners were entrusted with the task of attempting to institute diplomatic relations between the Southern Confederacy and any of the neutral Sovereign States in Europe, some parts, at all events, of the judgment in the case of the *Caroline* may be applied to this transaction. The despatches referred to in that judgment are said to be "despatches from persons who are, in a peculiar manner, the favourite objects of the protection of the law of nations, *Embassadors*, resident in a neutral country, for the purpose of preserving the relations of amity between that state and his own government.

"On these grounds a very material distinction arises, with respect to the right of furnishing the conveyance. The former cases were cases of neutral ships, carrying the enemy's despatches, from his colonies to the mother country. * * * * * But the neutral country has a right to preserve its relations with the enemy, and you

"are not at liberty to conclude, that any communication between them can partake, in any degree, of the nature of *hostility* against you. The enemy may have his hostile projects to be attempted with the neutral state; but your reliance is on the integrity of that neutral state, that it will not favour nor participate in such designs, but as far as its own councils and actions are concerned, will oppose them. And if there should be private reason to suppose, that this confidence in the good faith of the neutral state has a doubtful foundation, that is matter for the caution of the Government, to be counteracted by just measures of preventive policy, but is no ground, on which this court can pronounce, that the neutral carrier has violated his duty by bearing dispatches, which, as far as he can know, may be presumed to be of an innocent nature, and in the maintenance of a pacific connection. One material ground, therefore, is wanting, on which the judgment of the court proceeded in the former cases. Another distinction arises, from the character of the person, who is employed in the correspondence. He is not an executive officer of the Government, acting simply in the conduct of its own affairs within its own

" territories, but an Embassador resident in a neutral state, for the purpose of supporting an amicable relation with it.

" I have before said that persons discharging the functions of Embassadors are, in a peculiar manner, objects of the protection and favour of the law of nations. The limits that are assigned to the operations of war against them, by Vattel and other writers upon those subjects, are, that you may exercise your right of *war against them*, wherever the character of hostility exists; *you may stop the Embassador of your enemy on his passage;** but when he has arrived,

* May he be stopped in any other place than those in which the state which stops him has full rights of exercising *hostility?* The words of the judgment may raise a doubt, but the following extract from Vattel favours the latter construction. "The enemy's men may also be attacked and seized wherever there is a right of exercising acts of hostility. Thus a passage may not only be refused to the ministers of an enemy sent to other sovereigns, but if they undertake to pass privately, and without permission, into places belonging to their master's enemy, they are liable to be arrested; and of this the last war furnishes a signal instance. An ambassador of France going to Berlin, by the imprudence of his guides, took his way through a village within the electorate of Hanover, of which the sovereign, the king of England, was at war with France; he was arrested, and afterwards sent over to England. As his Britannic Majesty had herein only made use of the rights of war, neither the court of France nor that of Prussia complained about it."*

* Vattel's Law of Nations, Book IV., ch. vii., sec. 85. The passage is quoted from an English translation from the French, dated 1793. It is the only version which the writer has at hand.

"and has taken upon himself the functions of his office, and has been admitted in his representative character, he becomes a sort of *middle*-man, entitled to peculiar *privileges*, as set apart for the protection of the relations of amity and peace, in maintaining which all nations are in some degree interested. It has been argued that he retains his national character unmixed, and that even his residence is considered as a residence in his own country. But that is a fiction of law invented for his further protection only, and, as *such a fiction*, it is not to be extended beyond the reasoning on which it depends. It was intended as a *privilege;* and I am not aware of any instance in which it has been urged to his disadvantage. Could it be said that he would, on that principle, be subject to any of the *rights of war* in a neutral territory? Certainly not. He is there for the purpose of carrying on the communications of peace and amity, for the interest of his own country primarily, but, at the same time, for the furtherance and protection of the interests, which the neutral country *also* has in the continuance of those relations.

"It is to be considered, also, with regard to this question, what may be due to the convenience of the neutral state; for its interests may require that the intercourse of correspondence with the enemy's country should not be altogether interdicted. It might be thought to amount almost to a declaration, that an Embassador from the enemy shall not reside in the neutral state, if he is declared to be debarred from the only means of communicating with his own. For to what useful purpose can he reside there, without the opportunities of such a communication? It is too much to say, that all the business of the two states shall be transacted by the Minister of the neutral state, resident in the enemy's country. The practice of nations has allowed to neutral states the privilege of receiving Ministers from the belligerent states, and the use and convenience of an immediate negotiation with them.

"It is said, and truly said, that this exception may be liable to great abuses, and so, perhaps, will any rule that can be laid down on this subject:—

——— Mille adde catenas;
Effugiet tamen hæc ———

"Opportunities of conveying intelligence may always exist in some form or other."*

A lengthened extract from this able judgment has been given, notwithstanding the distinctions between the circumstances then before the court and those belonging to the present case. For although that judgment related to despatches, and to a Minister received by a neutral government and clothed with the full privileges of his official character, yet much of the reasoning is applicable to a case where no diplomatic relations as yet exist. If it is for the advantage of a neutral country to retain such relations, it may be for its advantage to commence them. And that regard to the fair interests of the neutral country, which is recognized in the judgment as forming one of the reasons for the decision, appears to be applicable, though in a less degree, in the other case also, unless there be something inconsistent with the duties of a neutral state towards belligerents in *commencing*, during a war, diplomatic negotiations with one of the contending powers.

This topic is connected with other questions, which the nature of the present con-

* Sir W. Scott, "The Caroline." 6 Rob., 466, 7, 8, 9.

flict in America may suggest. Is the Southern Confederacy entitled, by international law, to send ambassadors? Or, rather, are neutral sovereign states at liberty to receive ambassadors from it, without, in so doing, committing an offence against the Federal government, or violating the duties which attach to neutrals?

These questions shall be answered in the words of Mr. Wheaton's work on International Law. Parts of the extracts relate rather to internal revolutions than to the severance of particular provinces; but these different cases are treated together in some of the remarks upon them.

"Until the revolution is consummated, whilst the civil war involving a contest for the Government continues, other states may remain indifferent spectators of the controversy, still continuing to treat the ancient Government as sovereign, and the Government *de facto* as a society entitled to the rights of war against its enemy; or may espouse the cause of the party which they believe to have justice on its side. In the first case, the foreign state fulfils all its obligations under the law of nations; and neither party has any right to complain,

"provided it maintains an impartial neutrality."* "If the foreign state professes neutrality, it is bound to allow impartially to both belligerent parties the free exercise of those rights which war gives to public enemies against each other; such as the right of blockade, and of capturing contraband and enemy's property. But the exercise of those rights, on the part of the revolting colony or province against the metropolitan country, may be modified by the obligation of treaties previously existing between that country and foreign states."† "If the revolution in a state be effected by a province or colony shaking off its sovereignty, so long as the independence of the new state is not acknowledged by other powers, it may seem doubtful, in an international point of view, whether its sovereignty can be considered as complete, however it may be regarded by its own Government and citizens. It has already been stated, that whilst the contest for the sovereignty continues, and the civil war rages, other nations may either remain passive, allowing to both contending parties all the rights which war gives to public enemies,

* Wheaton's Elements of International Law. 6th Ed., p. 32.
† *Ib.*, 32.

" or may acknowledge the independence of the new state, forming with it treaties of amity and commerce, or may join in alliance with one party against the other. In the first case, neither party has any right to complain so long as other nations maintain an impartial neutrality, and abide the event of the contest."* " In the case of a revolution, civil war, or other contest for the sovereignty, although, strictly speaking, the nation has the exclusive right of determining in whom the legitimate authority of the country resides, yet foreign states must of necessity judge for themselves whether they will recognise the Government *de facto*, by sending to, and receiving Embassadors from it, or whether they will continue their accustomed diplomatic relations with the Prince whom they choose to regard as the legitimate sovereign, or suspend altogether these relations with the nation in question. So also where an empire is severed by the revolt of a province or colony declaring and maintaining its independence, foreign states are governed by expediency in determining whether they will commence diplomatic intercourse with the new state, or wait for

* *Ib.*, 34.

"its recognition by the metropolitan country.

"For the purpose of avoiding the difficulties which might arise from a formal and positive decision of these questions, diplomatic agents are frequently substituted, who are clothed with the powers, and enjoy the immunities of ministers, though they are not invested with the representative character, nor entitled to diplomatic honours."*

From what has been said upon this second branch of the subject, it may be inferred that persons connected with the military or naval service of the enemy are alone certainly liable to seizure in a neutral ship;† that civil servants of the enemy, if sent out in the public service to take part in the government of one of its colonies, may possibly be liable; but that there is not authority to support the detention of any other of the enemy's subjects, and that here the case might be left as complete.

* *Ib.*, 275—6.

† Some inference as to what is usually understood to be the rule in this matter may be formed from the warning in the Queen's Proclamation of May 13, 1861, against "carrying officers, soldiers, despatches, arms, military stores, or materials, or any article or articles considered and deemed to be contraband of war according to the law or modern usage of nations, for the use or service of either of the said contending parties, ——." Why are *officers* and *soldiers* only mentioned, if other persons also are supposed to be liable?

But further, as has been seen, there is ground to contend that persons in the position of the Southern Commissioners have some claims to a special immunity, inasmuch as, on the one hand, the later extracts indicate that foreign neutral states are at liberty to receive Ambassadors from revolting provinces at war with a parent state; and, on the other, in the judgment of Sir William Scott, in the case of *The Caroline*, the freedom from seizure allowed to the dispatches of an Ambassador is based in part on the right of a neutral state to maintain free diplomatic intercourse with a belligerent. The principle last adverted to is, at all events, susceptible of some application to the case in question.

And here the authority of Lord Stowell may be again introduced:—"All law is resolvable into general principles: The cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognized, by just corollaries, may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is not *new*, nor is it justly chargeable with being *an innovation* on the ancient law; when, in fact, the Court

does nothing more than apply old principles to new circumstances."*

There is another point of importance relating to the liability of the Commissioners to which it is proper to advert.

It has been assumed that the Federal Government and the Confederate States occupied (as far as neutrals are concerned) the ordinary position of Belligerent Powers, and that the liability of the Commissioners depended on the law relating to persons of that class, being subjects of one of such powers, and holding towards the other the relation of public enemies.

But the doubt has been sometimes suggested whether they were not rather to be treated by Great Britain as revolted subjects—in which case the whole aspect of the matter would be changed. A threefold reply may be given to this suggestion: for, *first*, from the extracts before given from Mr. Wheaton's work on International Law, it may be gathered that, on occasions of the revolt of provinces, foreign nations are at liberty to remain passive, *allowing to both contending parties all the rights which war*

* Sir W. Scott. The "Atalanta." 6 Robinson, 458.

gives to public enemies; and that, in that case, neither party has any right to complain, so long as the other nations maintain an impartial neutrality, and abide the event of the contest.* *Secondly*, the Queen's proclamation is evidence that Great Britain has taken such a position, and therefore that she acts regularly in allowing to both contending parties all the rights which war gives to public enemies.† And, *thirdly*, in this instance the seizure has been made in the exercise of the right of search. But the

* One of these passages has, it is true, a qualifying clause to the effect that the exercise of the rights of war, "on the part of the revolting colony or province against the metropolitan country, may be modified by the obligation of treaties previously existing between that country and foreign states." The writer is not aware, however, that this proviso is applicable to the present case.

† See the following clauses—"Whereas we are happily at peace with all sovereigns, powers, and states:

And whereas hostilities have unhappily commenced between the Government of the United States of America and certain states styling themselves the Confederate States of America:

And whereas we, being at peace with the government of the United States, have declared our royal determination to maintain a strict and impartial neutrality in the contest between the said contending parties:

We, therefore, have thought fit, by and with the advice of our Privy Council, to issue this our royal proclamation:

And we do hereby strictly charge and command all our loving subjects to observe a strict neutrality in and during the aforesaid hostilities, and to abstain from violating or contravening either the laws and statutes of the realm in this behalf, or the law of nations in relation thereto, as they will answer to the contrary at their peril."

right of search rests on the assumption that a *war* is subsisting. For "at present," to quote the words of Lord Stowell, "under the law as now generally understood and practised, no nation can exercise a right of visitation and search upon the common and unappropriated parts of the sea, save only on the belligerent claim. If it be asked why the right of search does not exist in time of peace as well as in war, the answer is prompt; that it has not the same foundation on which alone it is tolerated in war—the necessities of self-defence. They introduced it in war, and practice has established it. No such necessities have introduced it in time of peace, and no such practice has established it."*

It is by no means to be inferred that, because Great Britain thus treats the Confederate States as belligerents and as entitled to the privileges which international law confers on public enemies, she thereby expresses a judgment as to the lawfulness of the secession. She abstains from pronounc-

* (Sir W. Scott.) The "Le Louis," 2 Dodson, 245. And American authority may be cited to the same purpose. "The duty of self-preservation gives to belligerent nations this right. It is founded upon necessity, and is strictly and exclusively a war-right, and does not exist in time of peace." Kent's Comm., vol. 1, p. 153.

ing any judgment upon that point. Having determined that her own part is to maintain a strict neutrality, she owes to both parties the fulfilment of all the duties which a neutral has to fulfil towards a belligerent; and the due and faithful performance of these duties is consistent with a public opinion reprobating in the strongest degree what appears to be evil in either of the contending parties. The strength, and even the direction, of this feeling will vary with individual minds and characters, but its variety and its contradictions are consistent with a steady and uniform concession to each party of its authorized belligerent claims.

Another point which has engaged a good deal of public attention in reference to this seizure is the fact that the *Trent* was bound from one *neutral* port to another. Upon this point, however, it seems proper to notice some distinctions. As to *goods alleged to be contraband*, the fact of destination to a neutral port appears to be, by itself, a sufficient answer. Sir William Scott treats such a destination as one on which "no question of contraband could arise; inasmuch as goods going to a neutral port cannot come under

the description of contraband, all goods going there being equally lawful."*

But, in cases relating to the conveyance of *military persons*, or of *despatches*, other principles, already noticed, sometimes claim attention. Where neutral ships carry a belligerent's despatches from his colony to the mother country, his enemy has, it is stated, a right to conclude, that the effect of those despatches is hostile to himself, because they must relate to the security of the other belligerent's possessions, and to the maintenance of a communication between them; and it is a legal act of hostility to destroy those possessions, and that communication.* And in the case of such communications, the fact that the voyage of the neutral ship does not extend over the whole distance between the ultimate points of the journey is not an answer, if the assistance rendered to the enemy by carrying the despatches part of the way was conscious and intentional on the part of the neutral.

Thus in one case of a neutral ship carrying a packet from a hostile *to a neutral port*, the packet having a further destination to a

* The "Imina." 3 Rob., 167.

* The "Caroline." 6 Robinson, 446, ante, p.

hostile possession, the master made an affidavit averring his ignorance of the contents, and the court treated the case as one of "an offence originating chiefly in the misconduct or culpable negligence of the master."*

In another case of a similar voyage *to a neutral port*, there were on board despatches, and also a military officer of rank. There, also, the question of ignorance arose, and the Court remarked on its being "scarcely credible, that the master could have been deceived with respect to the character of a military officer of high rank," so as to be imposed upon by the disguise he had pretended to assume.†

Another case was that of *The Rapid* (Edwards, 228), in which the distinction is expressed that the presumption of innocence is in favor of the master of a ship passing between neutral ports, but there is a strong implication of his liability if he were in fact aware of what he was carrying. Sir William Scott said that it was "to be observed, that where the commencement of the voyage is in a neutral country, and it is to terminate at a neutral port . . . . there is less to

* The Susan. 6 Robinson, 461, 2 n. a.

† The Hope. 6 Robinson, 463, n. a.

excite the party's vigilance, and, therefore, it may be proper to make some allowance for any imposition which may be practiced upon him."*

It appears, then, that the mere fact of a neutral vessel starting from one neutral port on a voyage to another port also neutral, is not *conclusive proof* of its freedom from liability, since, at any rate, its master would be guilty of an offence against the law of nations if, on such a voyage, he carried despatches of a belligerent on their way between the mother country and its colony, being himself a conscious and willing agent in doing so.

In the present instance, however, there

* A passage from Mr. Wheaton's work on International Law may be adduced in confirmation of the present argument as to the doctrine of the English Courts. He mentions that, in a case before the Supreme Court of the United States, it was stated in the judgment of the Court "that it had been solemnly adjudged in the British Prize Courts, that being engaged in the transport service of the enemy, or in the conveyance of military persons in his employment, or the carrying of despatches, are acts of hostility which subject the property to confiscation. In these cases, the fact that the voyage was to a neutral port was not thought to change the character of the transaction. The principle of these determinations was asserted to be, that the party must be deemed to place himself in the service of the enemy state, and to assist in warding off the pressure of the war, or in favouring its offensive projects." Vol. 2, p. 221. Ed. 1836. The reference given, as to the American case, is to Wheaton's Rep., vol. 1, p. 382. The Commercen.

appears to be nothing corresponding with an ultimate destination to a colony; and there is a case which tends to show that where the *ultimate* destination is not to a hostile port, a vessel would be free from liability, even if conveying despatches which might otherwise occasion its condemnation.

This is the case of the *Trende Sostre*,* where a vessel was carrying a cargo of cordage and other things, and also despatches from a Dutch minister of state to Governor Jansen, at the Cape of Good Hope. Before she reached the Cape, that settlement had surrendered to the British, and thus lost its character of hostility, and it would seem that by that fact not only did the goods lose their nature of contraband, but that the despatch also no longer endangered the vessel's security. For, in his judgment in the *Atalanta* (a case relating to despatches), Sir William Scott is reported as speaking thus: "In the *Trende Sostre*, in which the same fact came incidentally before this court, the question of law was avoided, as was also that of contraband, by the circumstance, that, before the seizure, the Cape of Good Hope, to which port the vessel *was going*, had ceased to be

* 6 Robinson, 390, n. a.

a colony of the enemy, and had become an *English* settlement."

Thus it would seem that the destination to a subject, and hence probably to a neutral, port, is in some cases an absolute protection to a neutral ship, even in the case of despatches; and the writer is not aware of any case in which it has failed to destroy the liability attendant on carrying them, except when they had an ulterior destination beyond the neutral territory.

If a real offence has been committed against the rights of neutrals, as recognised by existing International law, what consequent steps should be taken by Great Britain?

That Law, associated as it is with the security and mutual rights of States, is not to be disregarded; and it cannot be maintained in respect, while contempt is with impunity thrown upon its rules. But the great weight of such considerations, and of others connected with the practical administration of government, is likely to be felt especially by those with whom the national decisions will rest.

* 6 Robinson, 457.

A sense of their importance is therefore consistent with the desire to urge rather some of those reasons which tend to forbearance and peace, and which are not less real, or less entitled to regard, than the others.

The occasions for enforcing International Law will vary in their urgency, with the clearness of the case, and with the wilfulness of the offence. If no explicit orders were at hand to guide the commander as a naval officer, it may have seemed to him less offensive to a neutral, to seize the Commissioners alone, than to take them and the neutral ship together. Yet, had he taken the latter course and brought the ship before an Admiralty court for trial, the question of costs and damages remaining to abide the event of the inquiry, there would have been no cause of national quarrel, and the matter might have been well despatched by such a tribunal. But if even the conduct of the officer is not necessarily to be thought a wilful outrage, still less is this to be charged on the Federal Government, as there appears to be no proper ground for imputing to it a participation in the original offence. And if, without their

fault, they have been placed in their present painful and difficult position, that fact itself makes a strong appeal on their behalf for the exercise of all possible forbearance and conciliation.

The principles of international law itself sanction and even require this, independently of the particular fact just noticed. "War is not to be resorted to without absolute necessity, nor unless peace would be more dangerous, and more miserable than war itself."* And "as we approach these awful confines, we must remember that it is the bounden and most sacred duty of every state to exhaust every legal means of redress, before it has recourse to the dreadful necessity of war."† And again "every pacific mode of redress is to be tried faithfully and perseveringly, before the nation resorts to arms."‡

* Kent's Comm. Vol. 1., p. 48.

"Sed quia bellum pacis causa suscipitur, . . ."
Grotius, de Jure Belli ac Pacis, I, 1.

"The love of peace should equally prevent the beginning of war without necessity, or continuing it when this necessity ceases." Vattel, book 4, c. 1.

"If war is sometimes lawful, and even necessary, as we have already shewn, this is to be understood when it is undertaken only for just reasons, and on condition that he who undertakes it, proposes by that means to obtain a solid and lasting peace." Burlamaqui, Politic Law, part 4, c. 2 (Nugent's Translation).

† Phillimore's International Law, vol. 3, p. 2.

‡ Kent, 1, 49.

Statesmen are entitled, and it is a part of their duty, to consider not only the particular occasion of a controversy, but its connection with what preceded and what may follow. Sometimes, when the rules of public Law may allow a particular offence to be a just cause of war, it may be unlikely that this would prove an efficient method of redress. War, if successful, may yet be unable to provide so sure guarantees against the renewal of an offence, as might he procured by judicious negociation. Or, apart from the particular cause of quarrel, it may be thought, from the circumstances of the world at the time, that, if war was resorted to, further and quite different complications would probably arise, which, without it, might never exist. And on a statesmanlike view of the relative importance of these considerations, the strict legal rights of the offended state may be waived, or a less satisfaction accepted. For national governments are not bound by the limitations which restrict the discretion of Admiralty judges. The rules of these courts may be broken in upon "by considerations of comity or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals

which have a right to entertain and apply them; for no man can deny that a state may recede from its extreme rights, and that its supreme councils are authorised to determine in what cases it may be fit to do so."* And considerations of humanity, affecting other states, have a claim to be regarded, as well as those which relate to the state whose rights have been infringed.

International law has been, and should be, progressive in its character, and it is in those cases in which a government is free to exercise its discretion, without violating the rights of others, that the tone of international controversies may most readily be softened and improved. Where may it be more fairly hoped that such opportunities will be used for that purpose, than in a country so powerful as Great Britain, and so familiar with the claims of men everywhere to just and kindly treatment?

Modern international law is "the law of nations, as it is now acknowledged in Christendom."‡ An appeal to the principles of Christianity is therefore not out of place in

* Sir W. Scott. The "Maria." 1 Robinson, 368.

‡ Sir James Mackintosh's Discourse on the Study of the Law of Nature and Nations, p. 82.

arguments on such a law. But the spirit of Christianity is one of peace and goodwill, and states, in proportion as they are influenced by it, will reflect that spirit in their political conduct. Much has been said about national honour as affecting this case. But its best title to esteem, is in its power to protect the peace of the world and to strengthen the maintenance of justice and right. One characteristic of great men is a freedom from a readiness to take offence. Should not this also be characteristic of a great nation?

The circumstances of the pending American contest furnish strong reasons for deprecating war, and this on grounds of humanity and consistency. The position of the Federal Government calls for the candour and indulgence of foreign states. Involved at disadvantage in a costly and difficult war, it is placed in a position which tasks, with peculiar severity, the resources of a republican government. On the other hand there has never, perhaps, been a time when England could better afford to be forbearing, delivered as she now is, by God's providence, from war without and from internal discord, strong in numbers and wealth and in a spirit of union and grateful loyalty. Is it not becoming at

such a time to relax something of that rigidity of rule, which, at another, it might be fit to maintain ?

But distinct from all this is the subject of slavery. The motives and conduct of the North in reference to it are not here in question. Whatever these have been, it can scarcely be doubted that the Southern confederates represent the cause of slavery, and are devoted to its interests, to an extent which has hardly had a parallel before. Their triumph would be its triumph, and we cannot now set limits to the ultimate results which would follow. This is, indeed, no reason why England should violate right principles with a view to resist so great an evil: absolute neutrality may be her duty. But looking back on the toils and triumphs of her philanthropists in contending with slavery and the slave trade, on her treasures liberally expended in that cause, on the negociations of her diplomatists and statesmen, with the actual results produced by them, it would, indeed, be melancholy, that she, of all nations, should now intervene and, in the very crisis when the upholders of slavery are struggling on its behalf as well as their own, should throw the weight of her counsels,

influence, and arms into the scale; and by the effects, though not the purpose, of her action, establish the ascendency and vigour, and recruit the resources, of so pernicious a system. Some real prejudice to our interests —much more some offence to national susceptibility, not resulting in more practical evils—would be wisely borne, if by that means such a shock to our best traditions could be escaped. And it would be a memorable distinction for an English statesman that he had been the means of delivering his country at once from the evils of war, and from the calamity of such an unblest partizanship.

And here, lastly, that event may be mentioned, which though not directly connected with this subject, has occupied the thoughts of the nation at the same period, and has turned them in a direction very unlike that of anger and resentment. Is it unreasonable to think that the memory of the Prince Consort may reinforce the esteem for those blessings of peace which his life contributed to increase and improve; as his sudden death has for a time renewed the recollection that human power and resources have no independent control over events, but are

subject to the absolute direction of Divine Providence. If, remembering "that eternal chain by which the Author of the universe has bound together the happiness and the duty of his creatures," we make the discovery of what is *right* our chief object, earthly vicissitudes need not discourage us, for they point to better sources of trust than even the best political sagacity can furnish.

APPENDIX.

Since the part of this pamphlet relating to international law has been printed, the writer's attention has been drawn to the fact that although, in the case of the "Caroline," it has been decided that despatches may lawfully be carried by a neutral *from* the ambassador of a belligerent in a neutral state to the belligerent country, it has also been decided, in the case of the "Constantia" (6 Rob. 461, a.), that despatches may not be lawfully carried from a belligerent country *to* the ambassador of a belligerent in a neutral country, the despatches in that case being however meant for the belligerent country. But the latter case was decided, it appears, on the 15*th of March*, 1808, and that of the "Caroline" on the 1*st of April*. In the case of the "Caroline," the immunity of ambassadors' despatches, sent from a neutral country, was treated as a point decided for the first time, and was rested on grounds which apply in principle also to despatches sent *to* ambassadors. May it not, therefore, be considered that the case of the "Constantia" was determined without reference to the point afterwards settled, and that, so far as concerns the privileges of ambassadors, it was virtually overruled by the later case?